DOCKET

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

PROCEEDINGS AND ORDERS

DATE: 111386

CASE NBR: 86-1-05211 CFY
SHORT TITLE: Read, John
VERSUS: United States

DOCKETED: Aug 4 1986

Date	Proceedings and Orders
Aug 4 1986	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Sep 8 1986	Order extending time to file response to petition until October 6, 1986.
Oct 6 1986	Brief of respondent United States in opposition filed.
Oct 9 1986	DISTRIBUTED. October 31, 1986
Nov 3 1986	REDISTRIBUTED. November 7, 1986
Nov 10 1986	Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

****

PETITION FOR WRIT OF CERTIORARI

No. 86-

86-5211

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN REED,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HENRIETTE D. HOFFMAN
THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
931 United States Courthouse
Foley Square
New York, New York 10007
Tel. No.: (212) 732-2971

Attorney for the Petitioner

No. 86-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN REED,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

QUESTION PRESENTED

1. Whether the District Court's erroneous decision to permit an alternate juror to deliberate and participate in the verdict as a thirteenth juror constituted a prejudicial violation of petitioner's nonwaivable right to be tried by a jury untainted by the participation of an unauthorized person (Fed.R.Crim.P. 24(c)).

2. Whether the jury charge on conscious avoidance of knowledge impermissibly diluted the mens rea requirement for conviction of both the conspiracy and wire fraud counts.

CONTENTS

	Page
Table of Cases Cited	ii
Questions Presented	Preceding page
Opinions Below	1
Jurisdiction	1
Rules Involved	1
Statement of the Case	2
1. Facts Relevant to the 13-Person Jury Deliberation and Verdict	3
2. Facts Relevant to the Conscious Avoidance Instruction	6
Reasons For Granting the Writ	
I. THE 13-PERSON JURY DELIBERATION AND VERDICT CONSTITUTES A PREJUDICIAL VIOLATION OF PETITIONER'S NONWAIVABLE RIGHT TO A JURY UNTAINTED BY THE PRESENCE AND PARTICIPATION OF AN UNAUTHORIZED JUROR (FED.R.CRIM.P. 24(c))	7
A. It is unfair to require a defendant to prove actual prejudice from a Rule 24(c) violation because the secrecy of jury deliberations makes it impossible for him to do so	7
B. The Panel's Finding that Appellant Waived a Mandatory Federal Rule Is Unwarranted	10
II. THE JURY CHARGE ON CONSCIOUS AVOIDANCE OF KNOWLEDGE DILUTED THE MENS REA REQUIREMENT FOR CONVICTION OF CONSPIRACY AND WIRE FRAUD	14
A. Conscious avoidance of knowledge is inconsistent with the mental state of agreement required in conspiracy	15
B. Conscious avoidance of knowledge is inconsistent with the mental state of specific intent to defraud required in wire fraud	17
Conclusion	17

TABLE OF CASES

	Page
Davis v. Georgia, 429 U.S. 122 (1976)	10
Horne v. United States, 264 F.2d 40 (5th Cir.), cert. denied, 360 U.S. 934 (1959)	11
King v. United States, 576 F.2d 432 (2d Cir.), cert. denied, 439 U.S. 850 (1978)	7
Kuykendall v. Southern Ry. Co., 652 F.2d 391 (4th Cir. 1981)	8
Sheppard v. Maxwell, 384 U.S. 333 (1966)	10
Tumey v. Ohio, 273 U.S. 510 (1927)	10
United States v. Allison, 481 F.2d 468 (5th Cir. 1973)	8, 9
United States v. Bailey, 444 U.S. 394 (1980)	15
United States v. Beasley, 464 F.2d 468 (10th Cir. 1972)	8
United States v. Chatman, 584 F.2d 1358 (4th Cir. 1978)	8
United States v. Chavis, 719 F.2d 46 (2d Cir. 1983)	11
United States v. Ciambrone, 787 F.2d 7994 (2d Cir. 1986)	16
United States v. Gelb, 700 F.2d 875 (2d Cir.), cert. denied, 104 S.Ct. 167 (1983)	17
United States v. Green, 523 F.2d 229 (2d Cir.), cert. denied, 423 U.S. 1074 (1975)	7
United States v. Guerrero-Peralta, 446 F.2d 876 (9th Cir. 1971)	12

Page

United States v. Mayutin, 398 F.2d 944 (2d Cir.), cert. denied, 393 U.S. 961 (1968) 7, 9, 11

United States v. Millard, 701 F.2d 1052 (2d Cir.), cert. denied, 461 U.S. 958 (1983) 9

United States v. Jones, 763 F.2d 518 (2d Cir. 1985) 7, 11

United States v. Lamb, 529 F.2d 1153 (9th Cir. 1975) 8

United States v. Lanza, 790 F.2d 1015 (2d Cir. 1986) 17

United States v. Lizarraga-Lizarraga, 541 F.2d 826 (9th Cir. 1976) 10

United States v. Mahler, 579 F.2d 730 (2d Cir.), cert. denied, 439 U.S. 872 (1978) 4

United States v. Mankani, 738 F.2d 538 (2d Cir. 1984) 16

United States v. Nash, 414 F.2d 234 (2d Cir.), cert. denied, 396 U.S. 940 (1969) 7

United States v. Neal, 692 F.2d 1296 (10th Cir. 1982) 12

United States v. Pachay, 711 F.2d 488 (2d Cir. 1983) 11 11

United States v. Ricks, 475 F.2d 1326 (D.C. Cir. 1973) 12

United States v. Roby, 592 F.2d 406 (8th Cir.) (per curiam), cert. denied, 442 U.S. 944 (1979) 11

United States v. Spiegel, 604 F.2d 961 (5th Cir. 1979), cert. denied, 446 U.S. 935 (1980) 11

United States v. Taylor, 490 F.2d 390 (6th Cir. 1974) 12

United States v. Vega, 447 F.2d 698 (2d Cir. 1971), cert. denied, 404 U.S. 1038 (1972) 11

Page

United States v. Virginia Erection Corp., 335 F.2d 868 (4th Cir. 1964) 8, 9, 11

United States v. Watson, 669 F.2d 1374 (11th Cir. 1982) 7, 9

United States v. Widgery, 636 F.2d 200 (8th Cir. 1980) 17

United States v. Wieschenberg, 604 F.2d 236 (5th Cir. 1979) 15

Vasquez v. Hillery, 54 U.S.L.W., 4068 (U.S. Jan. 14, 1986) 10

Williams v. Florida, 399 U.S. 78 (1970) 8, 9

Williams v. United States, 332 F.2d 36 (7th Cir. 1964), cert. denied, 379 U.S. 976 (1965) 11

STATUTES, REGULATIONS AND RULES

22 C.F.R. § 66 14
§ 121.01(c) 14
§ 121-30 14
122 14
123 14
§ 123.05 14
§ 127.01 14
§ 127.02 14

22 U.S.C. §2778 14

Fed.R.Crim.P. 24(c) ..... Passim
23(b) ..... Passim

OTHER AUTHORITIES

Page

L.B. Orfield, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES, §24:104 at 203 (1966) 8

SUTHERLAND STAT. CONST. §25.04 (1985) 11

H.Zeisel and S.Diamond, THE JURY SELECTION IN THE MITCHELL-STANS CONSPIRACY TRIAL, American Bar Foundation Journal 151 (1976) 8

APPENDIX

Judgment of the Court of Appeals May 5, 1986 ..... A

Opinion and Order of the United States Court of Appeals for the Second Circuit May 5, 1986 ..... B

Order denying petition for rehearing and rehearing en banc June 19, 1986 C

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner, John Reed, respectfully requests that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the District of Connecticut, convicting petitioner, after a jury trial, of conspiracy to violate the Arms Export and Import Control Act (22 U.S.C. §2778) and wire fraud (18 U.S.C. §1343).

OPINIONS BELOW

The Court of Appeals rendered an opinion on May 5, 1986, which is officially reported at 790 F.2d 208. A copy of the slip opinion is annexed as Appendix B. On June 19, 1986, the Court of Appeals denied a petition for rehearing with a suggestion for rehearing en banc. A copy of the order is annexed as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on May 5, 1986. A copy of the judgment is annexed as Appendix A.

No application has been filed for an extension of time within which to file this petition.

The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

RULES INVOLVED

Fed.R.Crim.P. 24(c)

> Rule 24. Trial Jurors
>
> (c) Alternate Jurors. The Court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alter-

> nate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanneled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impannelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

STATEMENT OF THE CASE

John Reed's conviction arose out of his limited role in an abortive scheme to export chemical protective suits and decontamination units to Iran and Afghanistan in violation of the Arms Export and Import Control Act (22 U.S.C. §2778) and the International Traffic in Arms Regulations (22 C.F.R. §§121-30) which require a government license to export defense articles on the Munitions List. Chemical protective suits are among the enumerated items on the Munitions List, and since 1980, it has been government policy to refuse licenses for shipment of items on the List to Iran and Afghanistan.

Petitioner Reed had no role in formulating the charged scheme, which was devised by Rene Schuler, a codefendant who pleaded guilty prior to trial and testified for the government. Schuler's plan was to ship 400,000 suits to Iran via Italy, falsely stating that Italy was the final destination of the goods, thus enabling him to obtain an export license. Petitioner's role was limited to introducing Schuler to a supplier who became suspicious that the deal was illegal when he learned

that the suits were destined for a Middle Eastern country. The supplier notified the United States Customs Service, and an agent, posing as the seller's export manager, entered the case. Purporting to negotiate the deal with Schuler, the agent generated extensive evidence that formed the basis of the prosecution's case.

Petitioner's defense at trial was that he never intended to violate the import-export laws and did not even know the suits were destined for Iran until the deal had fallen through and the charged conspiracy was over.

1. Facts Relevant to the 13-Person Jury Deliberation and Verdict

After both sides had rested, the court proposed to counsel that the remaining alternate juror be permitted to deliberate and participate in the verdict. The judge stated as follows:

> Gentlemen, three things. There is an alternate on the jury who stuck through six weeks of this and 15 days . . . .
>
> You might consider and talk with your client, Mr. Weinberger, as to what we want to do. My preference would be to let him deliberate, in which case you'd need a unanimous jury of 13. That has to be agreeable to both the Government and defense of course. If somebody were to fall ill or be indisposed during deliberations, you still would have a jury of 12 verdict [sic]. If he were able to deliberate throughout, then he would participate in the verdict.
>
> I like to do that because it's been a long trial, and I hate to see the gentlemen not be able to deliberate. I can't do that unless the parties agree. Give that some thought and let me know in due course when we finish the charge.

After a brief recess, defense counsel informed the court that he and the prosecutor* agreed to the court's suggestion:

---

*The panel's opinion stating that "both sides agreed to the judge's proposal," slip. op. at 3104, is correct but omits the fact that the only agreement on the record was between defense counsel and the prosecutor. There is no indication in the record that the defendant consented to the thirteen person jury.

> MR. WEINBERGER [defense counsel]: During the break, Your Honor, Mr. Shockley and I conferred. We've agreed to go along with your suggestion that the alternate be included.
>
> THE COURT: All right. I think he'll be very pleased with that, and I will notify him and tell him what that means about deliberation.

The court explained the 13-person jury procedure to the jurors as follows:

> I always like in all cases, criminal or civil, to try to permit the alternate or alternates to deliberate and reach a verdict with the jury. . . . [S]o we're going to ask Mr. Donahue to participate with you. That has to be by consent of the parties and counsel. They have graciously given me consent. All 13 of you will deliberate. If somebody becomes ill or indisposed, we can still have a verdict of 12. Otherwise, it will have to be a unanimous verdict of 13.

(T.1377-78).

A 13-person jury deliberated over a period of three days and found Reed guilty on both counts.

On appeal, petitioner argued that the alternate juror's deliberation and participation in the verdict presented the paradigm of taint which has been held to constitute prejudice requiring reversal, United States v. Jones, 763 F.2d 518, 522 (2d Cir. 1985); United States v. Mahler, 579 F.2d 730, 737 (2d Cir.), cert. denied, 439 U.S. 872 (1978); United States v. Hayutin, 398 F.2d 944 (2d Cir.), cert. denied, 393 U.S. 961 (1968), subsequent appeal sub nom. United States v. Nash, 414 F.2d 234 (2d Cir.), cert. denied, 396 U.S. 940 (1969). Additionally, petitioner argued that Rule 24(c) violations could not be waived by stipulation of counsel. United States v. Hayutin, supra, 398 F.2d at 950; United States v. Virginia Erection Corporation, 335 F.2d 868, 873 (4th Cir. 1964); United States v. Beasley, 464

F.2d 468, 470 (10th Cir. 1972); United States v. Allison, 481 F.2d 468, 472 (5th Cir. 1973).

The Court of Appeals rejected these arguments. First, it departed from the concept of prejudice employed in every prior precedent and substituted a standard of personal prejudice, which, it found, petitioner had not met. Appendix B, slip. op. at 3104-05. Focusing on jury size rather than on the presence of an unauthorized participant, the panel found that petitioner was not prejudiced because "there is no likelihood whatever that a thirteen man jury would convict more readily than would a twelve-man jury". Id. at 3103-06.

Second, the panel also held that petitioner waived his right under Fed.R.Crim.P. 24(c) to a jury of no more than 12 despite the absence in the record of any statement by either the defense counsel or the defendant that petitioner himself consented. Although Rule 24(c) is a mandatory rule,* the panel relied on cases involving the pre-1983 Rule 23(b),** a discretionary rule providing for juries of less than twelve. The panel held that defense counsel was his client's agent and that the trial court could accept counsel's waiver without any personal colloquy between the court and the defendant. Id. at 3106-07. The panel noted that several circuits require a defendant's personal assent on the record, but held that any error in failing to do so was harmless beyond a reasonable doubt. Id. at 3107.

---

*The pertinant part of Rule 24(c) reads "an alternate juror who does not replace a regular juror shall be discharged after the jury returns to consider its verdict" (emphasis added).

**Prior to the 1983 amendment Rule 23(b) read as follows:

> (b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. (emphasis added)

2. Facts Relevant to the Conscious Avoidance Instruction

In a charge conference prior to summations, defense counsel objected to the court's giving a conscious avoidance charge in a conspiracy case. Counsel argued that the essence of conspiracy was an agreement and that there had to be a meeting of the minds as to the nature of the illegal action contemplated. The District Court disagreed and gave the following charge on conscious avoidance:

> Nonetheless, to establish the essential element of guilty knowledge, it is not necessary for the Government to prove to a certainty that the defendant knew that the suits were headed for an illegal destination. It is enough that the Government proves beyond a reasonable doubt that the defendant was aware of a high probability of an illegal destination. If the Government proves this awareness and shows the defendant deliberately refused to learn the actual facts, then the Government has proved the element of guilty knowledge.

Petitioner argued to the Court of Appeals that the conscious avoidance instruction was improper on the conspiracy count, citing the Second Circuit's decisions in United States v. Mankani, 738 F.2d 538, 547 (2d Cir. 1984), and United States v. Cambrone, 787 F.2d 799, 810 (2d Cir. 1986).

The panel rejected the argument, holding that it was proper to give the conscious avoidance instruction on the conspiracy count. The panel apparently made a distinction between knowing participation in a scheme and knowledge of the unlawful aims and objectives of a scheme, as follows:

> In Mankani, the Court rejected the Government's argument that a defendant could become a member of a conspiracy by consciously avoiding participating in it. Where, as here, the defendant has become a member of a joint undertaking, he cannot avoid responsibility for its unlawful acts by closing his eyes to what is readily apparent. Appendix B, Slip op. at 3108.

REASONS FOR GRANTING THE WRIT

I. THE 13-PERSON JURY DELIBERATION AND VERDICT CONSTITUTES A PREJUDICIAL VIOLATION OF PETITIONER'S NONWAIVABLE RIGHT TO A JURY UNTAINTED BY THE PRESENCE AND PARTICIPATION OF AN UNAUTHORIZED JUROR (FED.R.CRIM.P. 24(c))

A. It is unfair to require a defendant to prove actual prejudice from a Rule 24(c) violation because the secrecy of jury deliberations makes it impossible for him to do so.

The panel's opinion departs from all prior precedents in adopting a standard of actual prejudice that requires a defendant to prove that there was a "likelihood" that he was more "readily convicted" as a result of the Rule 24(c) violation. This standard is unworkable and unjust. The paramount public policy of protecting the integrity of jury verdicts prohibits "investigation into the subjective motivations and mental processes of jurors." United States v. Green, 523 F.2d 229, 235 (2d Cir.), cert. denied, 423 U.S. 1074 (1975); King v. United States, 576 F.2d 432, 438 (2d Cir.), cert. denied, 439 U.S. 850 (1978). Consequently a defendant has no way to determine the unathorized juror's role in deliberations and the verdict.

Until petitioner's case, the Second Circuit, as well as every other circuit that addressed the issue, held that prejudice was established in the context of a Rule 24(c) violation if the unauthorized alternate participated in deliberations because participation itself taints the jury. Tainting of a properly constituted jury of twelve is viewed so seriously that it is equated with prejudice. United States v. Jones, 763 F.2d 518, 522 (2d Cir. 1985); United States v. Mayutin, 398 F.2d 944, 950 (2d Cir.), cert. denied, 393 U.S. 961 (1968), subsequent appeal sub nom. United States v. Nash, 414 F.2d 234 (2d Cir.), cert. denied, 396 U.S. 940 (1969); United States v. Watson, 669 F.2d

1374, 1391-92 (11th Cir. 1982); United States v. Lamb, 529 F.2d 1153, 1156 (9th Cir. 1975); United States v. Allison, 481 F.2d 468, 472 (5th Cir. 1973). Indeed the Fourth and Tenth Circuits have adopted an even stricter rule and find the mere presence of an alternate in the jury room per se reversible error. United States v. Chatman, 584 F.2d 1358 (4th Cir. 1978); (United States v. Virginia Erection Corp., 335 F.2d 868 (4th Cir. 1964);* United States v. Beasley, 464 F.2d 468 (10th Cir. 1972).**

The panel's opinion not only adopts a standard of prejudice that is impossible for a defendant to meet, but it also presumes lack of prejudice by relying on the general statistical proposition that the risk of convicting an innocent person increases as jury size diminishes. Appendix B, slip op. at 3105. This analysis ignores the equally well-known proposition that statistics are meaningless in an individual case and because of the fundamental principle that jury deliberation be secret, we cannot determine the role of an alternate in deliberations. However, as the study by Professors Hans Zeisel and Shari Diamond establishes, The Jury Selection in the Mitchell-Stans Conspiracy Trial, American Bar Foundation Journal 151, 162-66 (1976), one juror can turn a jury around. Congress' refusal to amend Rule 24(c) in the sixteen years since Williams v. Florida, 399 U.S. 78 (1970), held that a jury of twelve was not constitutionally required demonstrates unequivocally its decision to establish a uniform, bright-line

---

*The Fourth Circuit also followed the per se rule of reversal in the civil context where a case was submitted to a jury of seven and an alternate. Kuykendall v. Southern Ry. Co., 652 F.2d 391 (4th Cir. 1981).

**Accord L.B. Orfield, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES, §24:104 at 203 (1966):

> The presence of an alternate juror in the jury room during the deliberations of the twelve regular jurors is error, even though he does not participate in the deliberations, since it is violative of the cardinal principles that the jury shall consist of twelve that their deliberations shall remain private and secret.

rule, prohibiting an alternate's participation with the properly constituted jury.

A more serious defect in the panel's analysis that focuses merely on jury size is that it ignores the rationale of Rule 24(c), which is to protect the properly constituted jury from contact with an unauthorized person whose influence cannot be ascertained. Mandatory dismissal of alternates before deliberation is the mechanism for assuring the integrity of jury deliberations. A further indication that the focus of the Federal Rules is not on jury size for its own sake is that Rule 23(b) provides for juries of less than twelve. When Rule 23(b) was revised, Congress explicitly rejected the alternative of permitting alternates to sit with a deliberating jury until substituted. The Advisory Committee Note to Rule 23(b) stated:

> [T]his scheme is likewise attended by practical difficulties and offends "the cardinal principle that the deliberations of the jury shall remain private and secret in every case. United States v. Virginia Erection Corp., 335 F.2d 868 (4th Cir. 1964).

The citation in 1983 of Virginia Erection Corp. also establishes Congress' determination that Rule 24(c) not be eroded by Williams v. Florida. Indeed, Williams v. Florida explicitly stated that its holding did not preclude Congress or the state legislature from requiring 12-person juries. 399 U.S. at 103 and n.50.*

The prior standard equating jury taint with a prejudicial

---

*The continued viability of the rules of Hayutin and Virginia Erection Corp., that the parties may not stipulate to a jury of more than twelve, has also been repeatedly reaffirmed by federal circuits after Williams v. Florida. See, e.g., United States v. Jones, supra, 763 F.2d at 523; United States v. Hillard, 701 F.2d 1052, 1058 (2d Cir.), cert. denied, 461 U.S. 958 (1983); United States v. Watson, supra, 669 F.2d at 1391-92; United States v. Chatman, supra, 584 F.2d 1358; United States v. Lamb, supra, 529 F.2d at 1156; United States v. Allison, supra, 481 F.2d at 472.

violation of Rule 24(c) is also analgous to the standard this Court applies in other contexts involving the jury's fact-finding role. Only recently, in Vasquez v. Hillery, 54 U.S.L.W., 4068, 4070-71 (U.S. Jan. 14, 1986), the Court refused to apply a harmless error analysis to racial descrimination in grand jury selection because the error affected the integrity of the jury's function and "the effect of the violation cannot be ascertained." Id. Vasquez additionally noted that the Court similarly presumed prejudice where the error affected the fact-finding process and was "hidden from review," e.g., Tumey v. Ohio, 273 U.S. 510, 535 (1927)(prejudice presumed despite weight of evidence when judge had pecuniary interest in convicting); Davis v. Georgia, 429 U.S. 122 (1976)(per curiam)(prejudice presumed when juror excluded in violation of Witherspoon); and Sheppard v. Maxwell, 384 U.S. 333, 351-52 (1966)(prejudice presumed where pre-trial publicity tainted trial). Id. The clear import of these holdings is that where, as in petitioner's case, an impermissible influence affects the fact-finding process and public policy prevents inquiry into the jurors' thought processes, prejudice is presumed and a new trial is required.

B. The Panel's Finding that Appellant Waived a Mandatory Federal Rule Is Unwarranted

The panel opinion holds that appellant waived his right under Fed.R.Crim.P. 24(c) to a jury of no more than 12, despite the absence in the record of any statement by either defense counsel or the defendant that appellant himself consented. This holding departs from prior precedents that a prejudicial violation of Rule 24(c) cannot be excused under a doctrine of waiver. "There is no rule providing that the Court, or the parties, may stipulate for a jury of more than twelve, twelve being the magic

number." United States v. Hayutin, supra, 398 F.2d at 950; United States v. Virginia Erection Corp., supra, 335 F.2d at 873; United States v. Beasley, supra, 464 F.2d at 470; United States v. Allison, supra, 481 F.2d at 472. Accord, United States v. Jones, supra, 763 F.2d at 523-24 (defendants consent limited to brief presence but not participation of two alternates).

The panel's holding relies on cases involving findings of waiver under pre-1983 Rule 23(b) in the absence of any express consent of the defendant to a verdict by a jury of less than twelve. United States v. Vega, 447 F.2d 698 (2d Cir. 1971), cert. denied, 404 U.S. 1038 (1972); United States v. Spiegel, 604 F.2d 961, 965 (5th Cir. 1979), cert. denied, 446 U.S. 935 (1980); United States v. Roby, 592 F.2d 406, 408 (8th Cir.)(per curiam), cert. denied, 442 U.S. 944 (1979); Williams v. United States, 332 F.2d 36, 39 (7th Cir. 1964), cert. denied, 379 U.S. 976 (1965); Horne v. United States, 264 F.2d 40 (5th Cir.), cert. denied, 360 U.S. 934 (1959). Slip op. at 3106-7. These Rule 23(b) cases should not be extended to Rule 24(c) violations for two reasons:

First, by its terms, Rule 24(c) is a mandatory rule. United States v. Jones, supra, 763 F.2d at 523; United States v. Millard, supra, 701 F.2d at 1058; Sutherland Stat. Const. §25.04 (1985) (use of "shall" indicates mandatory intent). By contrast, both the prior and currently effective Rule 23(b) are discretionary rules, specifically providing for juries of less than twelve. As the Second Circuit itself has recently stated, "the general practice of the drafters of the Criminal Rules was to authorize waiver in express terms whenever waiver of a mandatory requirement concerning the jury was to be permitted." United States v. Pachay, 711 F.2d 488, 490 (2d Cir. 1983)(unanimity requirement of Rule 31(a) mandatory and therefore not waivable). Accord United States v. Chavis, 719 F.2d 46, 48 (2d Cir. 1983). Since waiver was not authorized in Rule 24(c), it is a non-waivable mandatory requirement.

Second, the legislative history of Rule 24(c) indicates that waiver is not permitted. The drafters of Rule 24(c) explicitly rejected the suggestion that an alternate be permitted to be present during deliberation. L.Orfield, Criminal Procedure Under the Federal Rules, §§24:1, 24:2 at 86-98 (1966). The original draft of what became Rule 24(c) provided for discharging alternates after the verdict. Id. at 87. In the course of the next several drafts, changes were made with respect to how the alternates should be treated, i.e. "subject to call" (third draft) and "under order of the Court" (fourth draft). Id. at 89. The sixth version stated that the alternate "shall not retire with the jury." "This was to make it clear that an alternate juror is not to retire to the jury room with the regular jury or when twelve regular jurors are in the jury room." Id. at 90. Of special relevance to petitioner's case is the fact that the Committee rejected the suggestion of one judge that it "is not sensible to keep alternate jurors during a long trial, and then discharge them before the work of the jury is completed." Id. at 98.

Even assuming that the mandatory requirement of Rule 24(c) 24(c) is waivable, the circuits are evenly divided on whether waiver is permissible without the defendant's personal consent. The Second, Fifth, Seventh, and Eighth Circuits permit waiver without the defendant's express consent. United States v. Vega, supra, 447 F.2d 698; United States v. Spiegel, supra, 604 F.2d at 965; United States v. Roby, supra, 592 F.2d at 408 Williams v. United States, supra, 332 F.2d at 39. However, the Sixth, Ninth, Tenth, and D.C. Circuits require the defendant's personal assent. United States v. Taylor, 498 F.2d 390 (6th Cir. 1974); United States v. Guerrero-Peralta, 446 F.2d 876 (9th Cir. 1971). United States v. Neal, 692 F.2d 1296, 1308 (10th Cir. 1982); United States v. Ricks, 479 F.2d 1326 (D.C. Cir. 1973). At the very

least, the standard of waiver for a mandatorily phrased federal rule should be a high one that ensures that a defendant fully understands what rights his attorney is giving up in his name.

In sum, the writ should be granted because the panel's opinion unreasonably departs from prior precedents of the federal circuits and sets a standard for prejudice from Rule 24(c) violations that is impossible for a defendant to meet because of the paramount value society places on the secrecy of jury deliberations. Additionally, the panel opinion incorrectly adopts a waiver rule based on a discretionary federal rule even though it is evident from the language of the statute and the legislative history that Congress did not intend to make Rule 24(c) violations waivable.

II. THE JURY CHARGE ON CONSCIOUS AVOIDANCE OF KNOWLEDGE DILUTED THE MENS REA REQUIREMENT FOR CONVICTION OF CONSPIRACY AND WIRE FRAUD.

The panel's holding that it was proper to charge the jury that petitioner's knowledge of the charged conspiracy's objectives can be proved by evidence that he deliberatly avoided knowledge of them impermissibly dilutes the mens rea requirement for conviction of conspiracy.

The sole issue at trial was whether Reed knowingly intended to participate in Schuler's fraudulent scheme to export chemical protective suits to Iran and Afghanistan in violation of the law.* Petitioner could not have had the mental state required for conviction of the conspiracy and wire fraud count without actually knowing that the scheme was illegal. It was therefore wrong to given an instruction on conscious avoidance of knowledge that diluted the mental state required for conviction by permitting the jury to convict petitioner if it found only that he deliberately avoided actual knowledge.

Over defense counsel's objection, the District Court gave the following charge on the conspiracy count:

---

*The Arms Export and Control Act (22 U.S.C. §2778) and the International Traffic in Arms Regulations (22 C.F.R. §§121-30) govern the commercial export of designated arms and munitions. Protective apparel and equipment designed for use with toxological agents and equipment are on the Munitions List. 22 C.F.R. §121.01(c). Persons who wish to export arms from the United States must first register with the State Department's Office of Munitions Control and obtain an export license for each shipment abroad. 22 C.F.R. §§66, 122, 123.

Licenses are granted or withheld on the basis of a number of considerations, principally the foreign policy of the United States toward the country that is the recipient of the arms. 22 C.F.R. §123.05.

The regulations make it unlawful to export articles on the Munitions List without first obtaining the required license and also prohibit the use of any false statements on the documents required to obtain license approval for export. 22 C.F.R. §§127.01, 127.02.

> Nonetheless, to establish the essential element of guilty knowledge, it is not necessary for the Government to prove to a certainty that the defendant knew that the suits were headed for an illegal destination. It is enough that the Government proves beyond a reasonable doubt that the defendant was aware of a high probability of an illegal destination. If the Government proves this awareness and shows the defendant deliberately refused to learn the actual facts, then the Government has proven the element of guilty knowledge.

A. Conscious avoidance of knowledge is inconsistent with the mental state of agreement required in conspiracy.

This charge was particularly prejudicial in petitioner's case because it eased the Government's burden of proving the extremely high culpable mental state required for conspiracy to violate the Arms Export Control Act. The Government had to prove that the defendant agreed and specifically intended to export without a license particular articles restricted by the Munitions List. United States v. Wieschenberg, 604 F.2d 236, 331 (5th Cir. 1979); United States v. Lizarraga-Lizarraga, 541 F.3d 826 (9th Cir. 1976)(conviction reversed because of failure to give specific intent charge). The court in Lizarraga-Lizarraga explained that the reason for this specific intent requirement was that unlike those substances generally known to be controlled by the Government, such as heroin, the items on the Munitions List might be exported innocently. Therefore, a voluntary, intentional violation of a known duty was required for culpability. Id. at 828. See also United States v. Bailey, 444 U.S. 394, 405 (1980)(conspiracy requires a "heightened mental state").

The impact of the conscious avoidance instruction was to permit the jury to convict petitioner by piling unsupported inference upon unsupported inference. First, the jurors were permitted to infer knowledge from "deliberate refusal to learn the actual facts." Then on the basis of this deliberate refusal to learn the facts, they were permitted to infer that petitioner

knowingly agreed to join a conspiracy, knowing that its purpose was to export chemical protective suits on the Munitions List and knowing that the required export license could not be legally obtained. Finally, from the lack of knowledge, the jurors were permitted to infer Reed's intent to violate the law.

Moreover, the inferences permitted by the conscious avoidance instruction were not only illogical, but inconsistent as well. The notion of avoiding knowledge is inconsistent with the conspiracy requirements of agreement and specific intent. United States v. Ciambrone, 787 F.2d 7994, 810 (2d Cir. 1986); United States v. Mankani, 738 F.2d 538 (2d Cir. 1984). As the Second Circuit stated in Ciambrone,

> Membership in a conspiracy cannot be proven by conscious avoidance, since the requisite mental state for conspiracy is intent. Conscious avoidance of participating in a conspiracy and agreeing to be a member of a conspiracy are mutually exclusive concepts. Id. at 810.

To paraphrase Ciambrone, how could petitioner consciously avoid learning about the fraudulent practices contemplated in shipping the chemical protective suits to an illegal destination and yet agree that the deal be concluded? Similarly if petitioner consciously avoided learning about the secret agreement to violate the Arms Export Control Act, how could he manifest the requisite intent to join that agreement? To ask the questions is to state the answers.

Nevertheless, the panel in petitioner's case accepted the logic of Mankani and Ciambrone but found that appellant's reliance on Mankani was misplaced:

> In Mankani, the Court rejected the Government's argument that a defendant could become a member of a conspiracy by consciously avoiding participating in it. Where, as here, the defendant has become a member of a joint undertaking, he cannot avoid responsibility for its unlawful acts by closing his eyes to what is readily apparent. Appendix B, Slip. op. at 3108.

The panel appears to be making a distinction between knowing participation or membership in the scheme charged and some knowledge of the unlawful aims and objectives of the scheme. See United States v. Lanza, 790 F.2d 1015 (2d Cir. 1986). This distinction does not make sense because it is meaningless to say that a person knowingly belongs to a conspiracy unless he knows of its unlawful aims.

B. Conscious avoidance of knowledge is inconsistent with the mental state of specific intent to defraud required in wire fraud.

The conscious avoidance instruction also diluted the mens rea requirement for the substantive offense of wire fraud. To prove the substantive crime of wire fraud, the Government must establish beyond a reasonable doubt a specific intent to defraud. United States v. Widgery, 636 F.2d 200, 202 (8th Cir. 1980)(mail and wire fraud); United States v. Gelb, 700 F.2d 875, 879 (2d Cir.), cert. denied, 104 S.Ct. 167 (1983)(mail fraud). Just as it is illogical to infer agreement from conscious avoidance of knowledge, so it is equally illogical for someone consciously to avoid learning that a scheme is fraudulent and at the same time be guilty of knowingly devising or participating in the same scheme.

CONCLUSION

For the foregoing reasons the writ should issue.

Respectfully submitted,

HENRIETTE D. HOFFMAN
PHYLIS SKLOOT BAMBERGER
The Legal Aid Society
Federal Defender Services Unit
511 United States Courthouse
Foley Square
New York, New York 10007
Tel. No.: (212) 732-2971

Attorney for the Petitioner.

Dated: New York, New York
August 1, 1986

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of May one thousand nine hundred and eighty-six

Present: HON. WILFRED FEINBERG,

CHIEF JUDGE,

HON. ELLSWORTH A. VAN GRAAFEILAND,

HON. RALPH K. WINTER,

Circuit Judges,

UNITED STATES OF AMERICA, Appellee, -V- JOHN REED, Defendant-Appellant.	Docket No. 85-1243

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

ELAINE B. GOLDSMITH,
Clerk

Edward J. Guardaro

By: Edward J. Guardaro,
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 955—August Term, 1985

(Argued January 7, 1986 Decided May 9, 1986)

Docket No. 85-1245

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN REED,

Defendant-Appellant.

Before:

FEINBERG, *Chief Judge*,
VAN GRAAFEILAND and WINTER, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the District of Connecticut convicting appellant after a jury trial before Judge Eginton of conspiracy to violate the Arms Export and Import Control Act, 22 U.S.C. § 2778, and wire fraud, 18 U.S.C. § 1343.

Affirmed.

HENRIETTA D. HOFFMAN, The Legal Aid Society, New York, N.Y., *for Defendant-Appellant*

LOUIS M. FISCHER, Department of Justice, Washington, D.C. (Stanley A. Twardy, Jr. U.S. Att'y, and William J. Shockley, Ass't U.S. Att'y, Bridgeport, Connecticut, on the Brief), *for Appellee*

VAN GRAAFEILAND, *Circuit Judge*

John Reed appeals from a judgment of the United States District Court for the District of Connecticut convicting appellant after a jury trial before Judge Eginton on one count of wire fraud, 18 U.S.C. § 1343, and one count of conspiracy to export articles on the United States Munitions List without a license from the Department of State and with the use of false export documents, 18 U.S.C. § 371, 22 U.S.C. §§ 2778(b)(2) and (c). We affirm.

Appellant's conviction stems from his role as a middleman who brought together prospective buyers and a seller in a scheme to export 400,000 chemical warfare protective suits to Iran. Because the suits are classified as defense articles on the United States Munitions List, *see* 22 C.F.R. § 121.1, their export is permitted only with prior approval from the Department of State. Since 1980, the United States has refused to grant export licenses for the shipment of defense articles to Iran. *See* Arms Export and Import Control Act, 22 U.S.C. § 2751 *et seq.*; Interna-

tional Traffic in Arms Regulations, 22 C.F.R. §§ 121-30. Appellant and his coconspirators planned to procure a falsified "end use certificate" listing Italy as the final destination for the suits, and then to transfer the suits from Italy to Iran. The plan was frustrated, however, when the prospective seller of the suits became suspicious of the purchasers' requirement that the suits not be made by persons of the Jewish faith. Deducing from this that Italy might not be the actual destination for the suits, the seller alerted the United States Customs Service. A Customs Agent, posing as the seller's export manager, insinuated himself into the scheme and gathered the evidence that formed the basis for Reed's indictment and subsequent conviction.

Appellant contended at trial that he did not know the suits ultimately were destined for Iran. Two witnesses testified, however, that they had told Reed while negotiations for the sale were in progress that the deal was not legitimate. In addition, the Government introduced evidence that appellant had made several prior offers to procure various defense items in violation of import-export laws, both to the participants in the Iranian deal and to others. In his charge to the jury, the trial judge gave a conscious avoidance instruction as well as an

---

[illegible]

instruction on the specific intent element of the crime of conspiracy.

Prior to charging the jury, the trial judge proposed to counsel for both sides that the single alternate juror be permitted to deliberate and participate in the verdict since he had "stuck through" the six-week proceeding. Both sides agreed to the judge's proposal, under which all thirteen jurors would have to return a unanimous verdict. After three days of deliberation, the thirteen-man jury returned a unanimous verdict of guilty on both counts.

Appellant's principal contention on appeal is that, in submitting his case to a thirteen-man jury, the district court violated Fed. R. Crim. P. 24(c), which requires a trial court to discharge unneeded alternate jurors prior to the time the jury commences its deliberations. Appellant contends that Rule 24 gave him the absolute right to be tried by a jury of no more than twelve and that this right could not be waived. We disagree.

In support of his contention, appellant cites decisions premised on the former widespread assumption that the Constitution required trial by a jury of twelve. *See, e.g., United States v. Haynie*, 398 F.2d 944, 950 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968). However, in *Williams v. Florida*, 399 U.S. 78 (1970), the Supreme Court held that "the fact that the jury at common law was composed of precisely 12 is a historical accident" and refused to interpret the Sixth Amendment in such a manner as to dictate the precise number that can constitute a jury. *Id.* at 102-03. It follows that a violation of Rule 24(c) does not require reversal *per se* absent a showing of prejudice. *United States v. Jones*, 761 F.2d 516, 523 (2d Cir.), *cert. denied*, 106 S. Ct. 361 (1985); *United States v. Hilliard*,

701 F.2d 1052, 1059 (2d Cir.), *cert. denied*, 461 U.S. 958 (1983). There has been no such showing in the instant case. Moreover, we agree with the observation of the Supreme Court of Washington that "[i]t would be difficult to see how [appellant] would be prejudiced by the use of a jury of thirteen instead of twelve." *State v. Cuzick*, 85 Wash. 2d 146, 148 (1975).

We are strengthened in this belief by several comments in United States Supreme Court opinions that followed *Williams v. Florida*, *supra*. In *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972), in which the Court upheld the defendant's conviction of robbery by a nine-man majority vote of the jury, Justice White said:

> Of course, the State's proof could perhaps be regarded as more certain if it had convinced all 12 jurors instead of only nine. It would have been even more compelling if it had been required to convince and had, in fact, convinced 24 or 36 jurors.

In *Ballew v. Georgia*, 435 U.S. 223, 234 (1978), Justice Blackmun said:

> Statistical studies suggest that the risk of convicting an innocent person rises as the size of the jury diminishes.

Justice Brennan, writing in *Brown v. Louisiana*, 447 U.S. 323, 332 (1980), said that "a decline in jury size had led to less accurate fact[finding] and a greater risk of convicting an innocent person."

Although the risk of conviction by a twelve-man jury might not be appreciably greater than by a thirteen-man jury, we are satisfied that there is no legitimate state

that a thirteen-man jury would convict more readily than would a twelve-man jury. Apparently, appellant and his trial counsel felt the same way. When the district judge suggested the possibility of using a thirteen-man jury, he directed defense counsel to discuss the matter with his client; the court stated that the procedure had to be agreed upon by both the Government and the defense or else he would not allow it. Thereafter, when defense counsel informed the judge that an agreement had been reached, the judge told the jury that the parties and counsel had consented to the alternate sitting as a juror. He instructed the jury that "your verdict of all 13 must be unanimous". When the jury returned to report its verdict, the court inquired whether "the jury of 13 had reached a unanimous verdict".

Appellant never has contended, either in the district court or in this Court, that he personally did not consent to the thirteen-man panel. The sole contention of his appellate counsel is that "Reed did not agree on the record to a 13-person jury." This contention must be viewed in the light of the generally accepted proposition that the lawyer is the agent of his client and his statements and representations in open court may be accepted by the court absent a showing of bad faith or gross negligence. *See United States v. McKeon*, 738 F.2d 26, 30 (2d Cir. 1984); *Brown v. Wainwright*, 665 F.2d 607, 612 (5th Cir. 1982) (*en banc*). There are numerous cases which hold that personal colloquy need not take place between the court and the defendant before there can be an effective waiver of a twelve-man jury. *See, e.g., United States v. Vega*, 447 F.2d 699 (2d Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972); *United States v. Spiegel*, 404 F.2d 901, 903 (9th Cir. 1969), *cert. denied*, 440 U.S. 935 (1980); *United*

States v. Ruth, 592 F.2d 408, 409 (8th Cir.) (per curiam), *cert. denied*, 442 U.S. 944 (1979); *Williams v. United States*, 332 F.2d 36, 39 (7th Cir. 1964), *cert. denied*, 379 U.S. 976 (1965); *Horne v. United States*, 264 F.2d 40 (5th Cir.), *cert. denied*, 360 U.S. 934 (1959). Although several Circuits require that the defendant's personal assent must appear on the record, *see United States v. Taylor*, 498 F.2d 390 (6th Cir. 1974); *United States v. Guerrero-Peralta*, 446 F.2d 876 (9th Cir. 1971), it is interesting to note that in 1983 Congress amended Fed. R. Crim. P. 23(b) to provide that, despite the absence of any stipulation by the parties, "if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors."

Because the waiver herein was neither prejudicial nor of constitutional magnitude and was made in the presence of the defendant in open court, we hold that, if the failure to record appellant's personal assent was error, it was harmless beyond a reasonable doubt. *See United States v. Ruth*, *supra*, 592 F.2d at 409. This holding should not be construed, however, as an endorsement of the stipulated use of thirteen man juries. As we stated in *United States v. Rivera*, 594 F.2d 931, 940 (2d Cir.), *cert. denied*, 444 U.S. 841 (1979), it is desirable that there be uniformity in the method of jury selection throughout the federal court system. The federal rules of criminal procedure establish juries of twelve as the national norm, with certain limited exceptions. We view with disfavor local departures from that norm made on an ad hoc basis and by resort to stipulation, and the procedure followed here should not be repeated.

Relying on this Court's decision in *United States v. Monkani*, 738 F.2d 538 (2d Cir. 1984), appellant also contends that the district court erred in its charge on conscious avoidance. This reliance is misplaced. In *Monkani*, the Court rejected the Government's argument that a defendant could become a member of a conspiracy by consciously avoiding participation in it. Where, as here, the defendant has become a member of a joint undertaking, he cannot avoid responsibility for its unlawful acts by closing his eyes to what is readily apparent. The evidence presented at trial was sufficient to warrant a conscious avoidance charge concerning appellant's knowledge that the suits' ultimate destination was Iran. *See United States v. Mohabir*, 624 F.2d 1140, 1154 (2d Cir. 1980).

Appellant's final argument is that the trial judge erred in admitting evidence that appellant offered to procure other defense items in violation of export restrictions. This evidence was relevant to appellant's knowledge of import-export restrictions on defense items and his willingness to violate those restrictions, and the trial judge twice cautioned the jury about the limited purpose for which the evidence was admitted. A trial judge's ruling that the probative value of similar acts evidence outweighs the risk of unfair prejudice to the defendant will not be reversed absent a clear showing of abuse of discretion. *United States v. Martino*, 759 F.2d 998, 1005 (2d Cir. 1985). There was no such abuse in the instant case.

The judgment of the district court is affirmed.

RECORD PRESS INC. 15th Chambers St. N.Y. 10007 (212) 619-4949

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 19th day of June one thousand nine hundred and eighty- six.

UNITED STATES OF AMERICA,

Appellee,

v.

Docket No. 85-1245

JOHN REED

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Defendant-appellant, John Reed

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

OPPOSITION BRIEF

ORIGINAL

No. 86-5211

RECEIVED
OCT 6 1986

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN REED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

SARA CRISCITELLI
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner's conviction should be reversed because an alternate juror participated in the jury's deliberations and verdict, so that petitioner was unanimously convicted by a jury of 13, a procedure to which defense counsel agreed.

2. Whether the district court erred in instructing the jury that petitioner could be convicted of conspiracy to export chemical warfare protective suits without obtaining a valid license from the Department of State if it concluded that he had deliberately refused to learn the identity of the country to which the protective suits that he conspired to export without a valid license were being sent.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. 86-5211

JOHN REED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B1101-B1124) is reported at 780 F.2d 204.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1986. A petition for rehearing was denied on June 18, 1986. The petition for a writ of certiorari was filed on August 4, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted on two counts charging conspiracy to export articles on the United States Munitions List without obtaining a license from the Department of State, to use export documents containing false statements in connection with those items, and to defraud the United States by impairing the foreign policy of this country, in violation of 18 U.S.C. 371 and 22 U.S.C. 2778(b)(2) and (c), and wire fraud, in violation of 18 U.S.C. 1343. He was sentenced to

two years' imprisonment. The court of appeals affirmed (Pet. App. B3101-B3108).

1. The evidence at trial, the sufficiency of which is not in dispute, showed that in 1984 petitioner acted as a middleman, bringing together prospective buyers and a seller, in a scheme to export 400,000 chemical warfare protective suits without a valid license. These suits, which were designed to protect persons from chemicals and nerve gas, are classified as defense articles on the United States Munitions List, 22 C.F.R. 121.1, and require prior approval from the Department of State for export. Because the State Department would not authorize export directly to Iran, the country to which the conspirators intended to sell the protective suits, petitioner and his co-conspirators planned to procure falsified certificates that listed Italy as the final destination of the protective suits. Pet. App. B3102-B3103.

Petitioner first put co-conspirator Rene Schuler, a Brazilian commodities broker who was attempting to locate sellers of the protective suits, in touch with an English supplier. The purchase from that supplier fell through, however, when the purchasers rejected his protective suits because they had been made in Israel (Tr. 625-628). Schuler contacted petitioner again, telling him that his buyers wanted American-made suits (Tr. 629). Petitioner telephoned a Connecticut supplier, Edward Stolarz, in May 1984 and told him that he needed 400,000 high quality protective suits (4/11/85 Tr. 7-12). 1/ The evidence showed that petitioner knew that the State Department would not permit such suits to be shipped without an end user certificate stating that the purchaser was an approved country (Tr. 809-811).

Stolarz alerted the United States Customs Service and introduced undercover Customs Agent Steven Crogan, posing as Stolarz's export manager, to Schuler. Schuler told Agent Crogan

---

1/ Most of the trial transcript was consecutively paginated. A few volumes were separately paginated, however, and we identify them by their date.

that the protective suits would be sent to Italy, which would be the country listed on the end user certificate. Tr. 63-68. Schuler said that he had paid a $12 million bribe to the Italian Defense Ministry to secure its cooperation (GX6A 8-12). In a subsequent taped conversation Schuler told Stolarz that petitioner did not know that the protective suits were to be sent to Iran. However, at trial Schuler testified that petitioner did know that the suits were to be sent to Iran, and that he told Crogan that petitioner did not know because he sensed that Crogan was concerned that too many people knew the details of the transaction (Tr. 660-66).

By July 10 the Iranian deal had apparently fallen through. In a taped telephone conversation, petitioner told Crogan that he had not dealt with Iranians before, although Schuler had, and that they were very erratic (GX11 1-2). On August 1, Schuler told Crogan that he was going to sell the suits to Afghanistan. In a subsequent recorded telephone conversation, Crogan told petitioner that they were planning to send the suits to Afghanistan through London, and petitioner expressed a preference for selling the suits to the Afghan rebels (GX12A 1).

2. Petitioner based his defense on the claim that he did not know until late July 1984, after he had put Schuler in contact with Stolarz, that the suits were destined for Iran and that he did not know until mid-August that Schuler was trying to sell the suits to Afghanistan. In its final instructions, over petitioner's objection, the district court instructed the jury on conscious avoidance of the truth. The court instructed (Pet. App. 21a) n.1):

> [T]o establish the essential element of guilty knowledge, it is not necessary for the Government to prove to a certainty that the defendant knew that the suits were headed for an illegal destination. It is enough that the Government proves beyond a reasonable doubt that the defendant was aware of a high probability of an illegal destination. If the Government proves this awareness and shows the defendant deliberately refused to learn the actual facts, then the Government has proven the element of guilty knowledge.

3. On the last day of trial, the district court suggested that a single alternate juror who sat throughout the six-week trial be allowed to participate in the deliberations. According to the court's proposal, the jury's verdict would have to represent the unanimous view of all 13 jurors. The court also stated that the alternate juror would not be allowed to participate in the deliberations unless both parties agreed. After a break, petitioner's trial attorney informed the district court that he and the prosecutor agreed to include the alternate juror in the deliberations. No specific representation as to petitioner's personal agreement was made. The district court then instructed the 13 jurors and advised that the verdict had to be unanimous. Pet. App. B3104, B3106.

4. The court of appeals rejected petitioner's contention that parties cannot consent to a 13-member jury and that, in any event, he did not consent personally. The court disapproved of the district court's action (Pet. App. B3107) because Fed. R. Crim. P. 24(c) requires the district court to discharge alternate jurors when the jury retires. However, the court noted that in Williams v. Florida, 399 U.S. 78, 102-103 (1970), this Court "held that 'the fact that the jury at common law was composed of precisely 12 is a historical accident' and refused to interpret the Sixth Amendment in such a manner as to dictate the precise number that can constitute a jury" (Pet. App. B3104). Therefore, the court of appeals found that a violation of Rule 24(c) "does not require reversal per se absent a showing of prejudice" (Pet. App. B3104). The court found that no prejudice was demonstrated in this case since "'it would be difficult to see how [petitioner] would be prejudiced by the use of a jury of thirteen instead of twelve'" (Pet. App. B3105 (quoting State v. Cuzick, 85 Wash. 2d 146, 148, 530 P.2d 288, 289 (1975)). Instead, the court decided, petitioner might have benefited because the government had to convince an additional juror of petitioner's guilt beyond a reasonable doubt. In any event, the court concluded, "there is

no likelihood whatever that a thirteen-man jury would convict more readily than would a twelve-man jury" (Pet. App. B3105-B3106).

The court of appeals also rejected petitioner's claim that his attorney's agreement to the 13-member jury was insufficient to establish a waiver. Instead, the court looked to "the generally accepted proposition that the lawyer is the agent of his client and his statements and representations in open court may be accepted by the court absent a showing of bad faith or gross negligence" (Pet. App. B3106). The court also noted that petitioner did not claim on appeal that he did not assent, but instead claimed only that he did not agree "on the record." The court then held that any error in failing to elicit a personal waiver from petitioner was harmless beyond a reasonable doubt (Id. at B3107).

The court of appeals also rejected petitioner's contention that the district court erred in instructing the jury on conscious avoidance of the truth. The court stated that "[w]here, as here, the defendant has become a member of a joint undertaking, he cannot avoid responsibility for its unlawful acts by closing his eyes to what is readily apparent" (Pet. App. B3108). It added that the evidence at trial was sufficient to warrant the instruction since petitioner contended that he was unaware "that the suits' ultimate destination was Iran" (ibid.).

ARGUMENT

1. Petitioner first challenges (Pet. 7-13) the court of appeals' refusal to reverse his conviction because 13 jurors rather than 12 found him guilty beyond a reasonable doubt. Review of this issue by this Court is unwarranted.

Petitioner primarily contends (Pet. 7-8) that review is warranted because the court's decision here conflicts with the decisions of numerous other circuits holding that the presence of an alternate juror in the jury room taints the jury's

proceedings. 2/ However, none of the cases on which petitioner relies involved a juror who became an actual member of the jury and voted, along with all the other jurors, to convict the defendant. Thus, in this case, unlike each of the cases on which petitioner relies, the alternate was not "as any other stranger to the proceedings" (United States v. Beasley, 464 F.2d 468, 469 (10th Cir. 1072)). Rather, the alternate here was an actual member of the jury and not an unauthorized person whose participation was not directed at reaching a verdict. Accordingly, review by this Court is not warranted to resolve a conflict in the circuits. 3/

Moreover, as the court of appeals explained, most of the cases on which petitioner relies are "premised on the former widespread assumption that the Constitution required trial by a jury of twelve" (Pet. App. B3104). The basis for those decisions was United States v. Virginia Erection Corporation, 335 F.2d 868, 871 (4th Cir. 1964), in which the court stated that the "'trial by jury' contemplated by Article III, Section 2, and the Sixth Amendment is a trial by a jury of twelve persons, neither more nor less" (emphasis in original). However, as the court below found, the underpinning of Virginia Erection Corporation was removed by this Court's subsequent decision in Williams v. Florida that a jury of 12 persons is not required by the

---

2/ Petitioner also contends that the decision here conflicts with a number of other decisions of the Second Circuit. Review by this Court is not warranted to resolve an intracircuit conflict. Wisniewski v. United States, 353 U.S. 901 (1957).

3/ Petitioner's reliance (Pet. 9) on the Advisory Committee Note to Fed. R. Crim. P. 23(b) disapproving the suggestion that alternate jurors be sent in to listen to, but not participate in, the deliberations of the 12 jurors, is inapt. The Advisory Committee disapproved of the presence of a silent, non-voting 13th juror during deliberations because it would violate the "'cardinal principle that the deliberations of the jury shall remain private and secret in every case.' United States v. Virginia Erection Corp., 335 F.2d 868 (4th Cir. 1964)." But rather than allowing a spectator to observe deliberations, the court below allowed the 13th juror to participate actively in the jury process. His presence no more violated the principle of privacy of deliberation than did the presence of the other 12 jurors.

Constitution.

In addition, as the court of appeals concluded, it is clear that petitioner was not prejudiced by the presence of the 13th juror. To the contrary, the government was required to convince an additional person that petitioner was guilty beyond a reasonable doubt. As the court of appeals stated, "there is no likelihood whatever that a thirteen-man jury would convict more readily than a twelve-man jury" (Pet. App. B3105-B3106). Petitioner apparently agreed, and therefore did not object to the court's proposal that the alternate juror join in the jury's deliberations. 4/

Finally, review of this issue is inappropriate because the factual situation presented is unlikely to recur. We know of no other case where a 13-member jury deliberated and reached a unanimous verdict. The admonition of the court of appeals that "the procedure followed here should not be repeated" (Pet. App. B3107) diminishes the likelihood that any district court in the future will propose that an alternate be allowed to sit as a 13th juror. In these circumstances, review by this Court is unwarranted.

2. Nor is review by this Court warranted to consider petitioner's contention (Pet. 14-17) that the court's instruction on conscious avoidance of the truth "diluted the mental state required for conviction" of conspiracy (id. at 14). 5/ Read as a whole, the jury instructions made clear that the government was

---

4/ Petitioner's contention that a party cannot stipulate to a 13-member jury is belied by Fed. R. Crim. P. 23(b), which permits parties to stipulate to fewer than 12 jurors. If the parties can stipulate to fewer than 12 jurors, there is no good reason why they cannot stipulate to more than 12, particularly since there is no constitutional significance to the number 12.

5/ There is no merit to petitioner's argument (Pet. 17) that the conscious avoidance of the truth instruction affected his conviction for wire fraud, since the challenged instruction plainly fell within the portion of the charge dealing only with the conspiracy count. Moreover, conscious avoidance of the truth instructions have been used and approved in mail and wire fraud cases. E.g., United States v. Precision Medical Labs, Inc., 593 F.2d 434 (2d Cir. 1978); United States v. Glick, 710 F.2d 639, 642 (10th Cir. 1983), cert. denied, 465 U.S. 1005 (1984).

required to prove that petitioner specifically intended to participate in an illegal scheme.

The district court fully instructed the jury on specific intent as an element of conspiracy. The court instructed the jury that it could not convict petitioner unless it found, beyond a reasonable doubt, that petitioner voluntarily and willfully agreed to participate in the conspiracy charged in the indictment (Tr. 1460). The court defined "willfully," instructed the jury on specific intent, and charged the jury to find that petitioner knew the essential nature of the conspiracy (Tr. 1460-1462). In addition, the court instructed that petitioner's mere association with members of the conspiracy or mere knowledge of or acquiescence in the plan without participation was not sufficient (Tr. 1463-1464). Instead, the court emphasized that petitioner could not be convicted unless the jury found that he intentionally joined in the conspiracy "with an understanding of its unlawful character" (Tr. 1464). In short, the entire body of instructions made abundantly clear that the jury could not convict petitioner unless it was convinced, beyond a reasonable doubt, that he intended to join in the conspiracy with Schuler to export the chemical protective suits in an illegal manner. 6/

Read as a whole, as they must be (United States v. Park, 421 U.S. 658, 674 (1975); Cupp v. Naughten, 414 U.S. 141, 146-147 (1973)), the instructions did not permit the jury to convict petitioner unless it concluded that he knew that protective suits were not going to be sent to Italy, the country to be listed on the end user certificate. Petitioner based his defense on the claim that he did not know that the protective suits were destined for Iran or that, after the transaction with Iran fell

---

6/ Petitioner also errs in arguing (Pet. 15) that the challenged instruction "permit[ted] the jury to convict petitioner by piling unsupported inference upon unsupported inference." To the contrary, the court specifically instructed the jury that, while it could draw reasonable inferences from the evidence, it could not draw one inference from another, but rather was confined to drawing but one inference from a particular set of facts (Tr. 1448).

through, that Schuler was attempting to arrange a deal with Afghanistan. Petitioner repeats that contention here, stating that the "sole issue" is whether he "knowingly intended to participate in Schuler's fraudulent scheme to export chemical protective suits to Iran and Afghanistan in violation of the law" (Pet. 14 (emphasis added)). However, the government did not have to show that petitioner knew where the protective suits were to be sent, but instead had to show only that the purpose of the scheme was to export without a valid license items that are restricted by the Munitions List. United States v. Wieschenberg, 604 F.2d 326, 331 (5th Cir. 1979); United States v. Lizarraga-Lizarraga, 541 F.2d 826, 828-829 (9th Cir. 1976). As the court of appeals concluded (Pet. App. B3108), the challenged instruction simply explained that the government did not have to prove that petitioner knew the intended destination of the protective suits, while the other instructions made clear that the government had to prove that petitioner knew that false documentation would be used in connection with the transaction. In any event, review by this Court is not warranted to resolve the fact-bound issue whether the instructions, read as a whole, impermissibly lessened the government's burden in this case.

Moreover, there was abundant evidence that the purpose of the scheme was to export the 400,000 protective suits in an illegal manner, and the evidence amply established that petitioner was aware of the illegal nature of the scheme. He knew that Schuler planned to use an end user certificate identifying Italy as the ultimate destination of the protective suits. The jury was certainly entitled to conclude, from petitioner's knowlege that the buyer would not accept protective suits made in Israel, that he knew that the suits were not destined for Italy but were instead destined for the Middle East. In addition, it defied belief that Italy would use a Brazilian middleman to procure defense materials that its government could have obtained directly from our government.

And, of course, Iran was involved in a war with Iraq in 1984 and Afghan rebels were fighting Soviet occupiers, and it was widely reported that the combatants in both conflicts were using chemical weaponry, while there was no apparent reason why Italy would want 400,000 chemical warfare protective suits. Accordingly, it was clear beyond doubt that petitioner knew that the protective suits were not going to be sent to Italy, and he must have suspected that they were destined for Iran, Iraq, or Afghanistan.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

SARA CRISCITELLI
Attorney

OCTOBER 1988

OPINION

SUPREME COURT OF THE UNITED STATES

JOHN REED *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 86–5211. Decided November 10, 1986

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

In this case, the District Court permitted a thirteenth, alternate juror to participate in the jury's deliberations, a procedure to which petitioner's counsel stipulated. The thirteen jurors unanimously found petitioner guilty. On appeal, petitioner argued that the use of a thirteen-member jury violated Federal Rule of Criminal Procedure 24(c), that the Rule is not waivable, and that even if it is, it can only be waived by a defendant personally and not by counsel. The Court of Appeals held that petitioner, through his counsel, had waived compliance with Rule 24(c). It concluded that "[b]ecause the waiver herein was neither prejudicial nor of constitutional magnitude and was made in the presence of the defendant in open court, . . . the failure to obtain appellant's personal assent . . . . [if erroneous,] was harmless beyond a reasonable doubt." 790 F. 2d 208 (CA2 1986). This decision conflicts with *United States* v. *Virginia Erection Company*, 335 F. 2d 869, 870 (CA4 1964), which requires a defendant's express and personal waiver of Rule 24(c), assuming that the Rule can be waived at all. *See also United States* v. *Chatman*, 584 F. 2d 1358 (CA4 1978) (explaining *Virginia Erection* as establishing a *per se* rule of plain error in cases where Rule 24(c) is violated without obtaining a defendant's personal consent); *United States* v. *Beasley*, 464 F. 2d 468 (CA10 1972) (holding, in a case not involving an issue of waiver, that violations of Rule 24(c) are reversible *per se*, and approving the result in *Virginia Erections*). I would grant certiorari to resolve this conflict.